THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATHANIEL WELLS, JR., Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Case No. C09-1137-JCC-BAT ORDER

The Court, having reviewed Petitioner's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Dkt. No. 1), the evidentiary-hearing materials (Dkt. Nos. 31, 21, 35), the report and recommendation of U.S. Magistrate Judge Brian A. Tsuchida (Dkt. No. 36), Petitioner's objections (Dkt. No. 38), and the remaining record, adopts the report and recommendation, denies Petitioner's claims, dismisses the matter with prejudice, and denies Petitioner a certificate of appealability for the reasons explained herein.

This Court must make a de novo determination of those portions of a magistrate judge's report or specified proposed findings or recommendations to which a party objects. 28 U.S.C. § 636(b)(1). Petitioner objects to several portions of the report and recommendation. First, Petitioner objects to the report's statement that each count of aggravated identity theft carried a mandatory sentence of two years that is generally served consecutively. (Objections 3 (Dkt.

No. 38).) Petitioner does not dispute the accuracy of the statement but argues that it is misleading because not all such sentences are served consecutively. (*Id.* at 4.) That some such sentences may not be served consecutively is consistent with the use of the term "generally." There is no error in the report.

Second, Petitioner objects to the report's conclusion that in order to establish prejudice, Petitioner must demonstrate that he would have not pleaded guilty and would have insisted on going to trial. (*Id.*) The Supreme Court and the Ninth Circuit have held that a petitioner attempting to satisfy the prejudice prong of an ineffective-assistance-of-counsel claim in the context of a guilty plea "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Chacon v. Wood*, 36 F.3d 1459, 1464 (9th Cir. 1994); *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986). Moreover, although Petitioner may have pleaded guilty without conceding the two-point sentencing enhancement and still have received the three-point reduction for acceptance of responsibility if he pleaded guilty "straight up," *see United States v. Johnson*, 581 F.3d 994, 1000–01 (9th Cir. 2009), the likelihood of receiving a three-point reduction through a plea agreement, instead of a two-point reduction without such an agreement, was highly unlikely and certainly not a reasonable probability. *See* U.S.S.G. § 3E1.1 (allowing a three-point reduction, instead of a two-point reduction, upon a motion by the government for timely notification and assistance). Further, the plea agreement included the dismissal of the additional counts that carried mandatory additional sentencing. The Court cannot modify the plea agreement in Petitioner's favor as requested; it can only return Petitioner to the negotiating table. Petitioner has not shown a reasonable probability of a different outcome absent counsel's allegedly deficient performance.

Third, Petitioner objects to the report's conclusion that Petitioner misreads *United States v. Pham*, 545 F.3d 712 (9th Cir. 2008). (Objections 5 (Dkt. No. 38).) This is merely an objection of semantics. Petitioner's motion does not rise or fall on a reading of *Pham*, and the

report accurately states its holding.

Fourth, Petitioner objects to the report's conclusion that Petitioner did not show that his attorney's performance fell below the standard of objective reasonableness. (*Id.*) Plaintiff alleges that his attorney should have performed a more thorough investigation, yet even Petitioner relies on *Strickland v. Washington*, 466 U.S. 668, 691 (1984), which held that "Counsel has a duty . . . to make a reasonable decision that makes particular investigations unnecessary." (*Id.* at 5–6.) Petitioner has not shown that his counsel's performance was deficient. Petitioner's counsel determined that the government would be able to prove actual financial loss by at least ten victims. That determination was reasonable because the conspiracy involved three identity-theft victims, nine financial institutions, and eight car dealerships. (*See* Indictment (CR Dkt. No. 18).)[1] Further, counsel reasonably encouraged Petitioner to agree to the two-point sentencing enhancement in exchange for both the government's offer of a three-point sentencing reduction for taking responsibility and the dismissal of four counts of aggravated identity theft and Social Security fraud. (Plea Agreement 7 (CR Dkt. No. 51).) Petitioner makes no showing that the government would have offered the three-point sentencing reduction absent the agreement. Absent a plea agreement, the aggravated-identity-theft charges would have added at least two years and at most eight years to Petitioner's sentence. *See* 18 U.S.C. § 1028A(b)(2). Counsel's advice to Petitioner was based on a reasonable weighing of the benefits of the plea agreement; the performance was not deficient. *See Strickland*, 466 U.S. at 690 ("[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.").

Fifth, Petitioner objects to the report's conclusion that he failed to establish prejudice as

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[1] The Court refers to "Dkt." when citing the docket for the § 2255 motion and to "CR Dkt." when citing the docket for the underlying criminal matter CR07-346-JCC.

a result of his attorney's allegedly deficient performance. (Objections 6 (Dkt. No. 38).) In particular, Petitioner claims that the evidence establishes that the government would have been unable to prove that ten or more victims sustained actual loss. (*Id.* at 7.) Given the number of potential victims previously discussed, the evidence does not establish the government would have been unable to prove that ten or more victims sustained financial loss. Moreover, Petitioner asks the Court to modify the plea agreement by eliminating the two-point enhancement. (Pet'r's Evidentiary Hr'g Br. 1–2 (Dkt. No. 32).) As previously discussed, Petitioner does not allege that he would have insisted on going to trial absent counsel's advice, and the Court cannot simply change the plea agreement to make it more favorable to Petitioner.[2]

Sixth, Petitioner objects to the recommendation that the Court deny a certificate of appealability, claiming that he presented "material and debatable" questions. (Objections 7 (Dkt. No. 38).) This Court concludes that no jurists of reason could disagree that Petitioner failed to meet at least one of the prongs needed to show ineffective assistance of counsel. Additionally, no reasonable jurist would disagree with the Court's earlier conclusion that Petitioner waived his right to collaterally challenge his sentence. (*See* (Order Adopting Report & Recommendation (Dkt. No. 22).)

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[2] Petitioner does not object to the report's conclusion that Petitioner omitted all argument regarding his claims to error in the filing of a notice of appeal and his criminal-history calculation.

For the foregoing reasons, the Court DENIES Petitioner's remaining habeas claims and DISMISSES his 28 U.S.C. § 2255 motion with prejudice. Further, the Court DENIES the issuance of a certificate of appealability.

DATED this 15th day of October, 2010.

John C. Coughenour
UNITED STATES DISTRICT JUDGE